PENANG PORT COMMISSION

v.

KANAWANGI SEPERUMANIAM (NO. 1)

COURT OF APPEAL, KUALA LUMPUR
MAHADEV SHANKAR JCA
V.C. GEORGE JCA
ABDUL MALEK AHMAD J
[CIVIL APPEAL NO: W-03-16-1994]
2 AUGUST 1995

CIVIL PROCEDURE: *Jurisdiction - Court of Appeal - Whether seised with jurisdiction to make interim order for preservation of moneys pending disposal of appeal - Whether empowered to make order to prevent injustice or prejudice to claims - Sections 44(1) & 44(3) Courts of Judicature Act 1964 - Scope of operation.*

CIVIL PROCEDURE: *Remedy - Respondent aggrieved by order of Court of Appeal - Proper course of action - Whether to appeal - Whether proper to cross-apply to set aside order.*

DAMAGES: *Dismissal - Damages for injured feelings - Whether could be awarded simpliciter - Loss - Whether must be shown to have actually occurred and be recoverable in law - Registrar making award of RM2 million for distress, anguish, anxiety, inconvenience, embarrassment and humiliation - Whether sustainable - Whether without legal basis.*

This was an interim application by the appellant for an order that the respondent hand over to the Deputy Registrar, Court of Appeal, the certificate of a Fixed Deposit Account into which the respondent had placed the sum of RM2,351,725.80 paid him by the appellant's bankers.

The respondent is an advocate and solicitor but otherwise an ex-employee of the appellant. In 1987 the respondent took out an action for wrongful dismissal against the appellant, for which summary judgment was granted by the Judge. Following the judgment, on 24 October 1994, the Deputy Registrar (Registrar) awarded the respondent damages of RM2,274,151.42 (the assessment order), of which RM2 million was for distress, anguish, inconveniences, embarrassment and humiliation.

The appellant applied for a stay of the assessment order, but the application was dismissed by the Registrar on the ground that he was then *functus officio*. The appellant also appealed to the Judge in Chambers against the order, but the appeal could not proceed as the Registrar's notes of evidence were not forthcoming.

The respondent, meanwhile, took steps to enforce the assessment order and, having obtained a garnishment order, served notice on the appellant's bankers to show cause why that order should not be made absolute. The appellant applied to strike out the order, citing s. 39 of the Penang Port Commission Act 1955 as reasons therefor, but all the same, the order was made absolute by the Registrar on 7 December 1994 (the garnishee order).

The appellant appealed to the Judge against the garnishee order, and against Registrar's refusal to grant stay of execution, but the appeals, together with a separate application for stay, were dismissed by the learned Judge. The appeal against the assessment order, however, was adjourned by the Judge, whereupon the appellant applied to the Court of Appeal for a stay of the assessment order as well as the garnishee order.

On 20 December 1994, pursuant to the appellant's application, the learned President of the Court of Appeal made an *ex parte* interim order ordering stay of the assessment order and the garnishment order until the hearing of the application *inter partes* on 3 January 1995. By the time of this *ex parte* interim order, however, the appellant's Bankers (BBMB) had already paid the respondent the assessed damages.

At the hearing of 3 January 1995, the respondent informed the Court that he had placed the monies in question in a fixed deposit account. The respondent, however, failed to provide the Court, or the appellant, with the particulars of the said account. In the circumstances, an order was made by the Court (order of 3 January) restraining the respondent from dissipating the monies pending the appellant's application for a proper injunction to preserve the monies, and following that, the appellant made the present application praying for an interim order that the respondent hand over the certificate of the Fixed Deposit Account to the Registrar.

The respondent, by way of cross-application, applied to set aside the order of 3 January on the grounds (i) that the Court of Appeal had no jurisdiction to make such order because such an order amounted to a Mareva injunction (ii) that the order being an interlocutory order was not appealable (iii) that only the High Court could make such an order, and finally (iv) that s. 44 of the Courts of Judicature Act 1964 had no application. Before the learned appeal Judges the primary issues that arose were:

(i) whether there was any basis for the award made by the Registrar.

(ii) whether the trial Judge erred in law in refusing the appellant's application for a stay of execution.

(iii) whether, having been aggrieved by the order of 3 January, it was proper for the respondent to have sought remedy by way of cross-application.

Held:

Per Mahadev Shankar JCA (delivering the judgment of the Court):

[1] If the respondent was aggrieved by the order of this Court on 3 January 1995 his only remedy was to appeal. This he failed to do.

[2] There was no merit in the contention that the Court of Appeal had no jurisdiction to make the order of 3 January 1995. By s. 44(1) Courts of Judicature Act 1964, this Court is empowered to make an interim order to prevent prejudice to the claims of the parties before it. Section 44(3) of the Act, in addition, has vested the full Court with parallel jurisdiction which extended to varying the order of the single Judge.

[3] This whole case revolved on the appellant's efforts to preserve the subject matter of this action until the final disposal of this appeal. Bearing this in mind, the respondent's reluctance to come out with full particulars as to what he had done with it and his contention that the Court should not interfere with his right to the fruits of his litigation has justifiably increased the apprehension of the appellant that there is a very real risk that a successful appeal would be rendered nugatory.

[4] At common law, damages cannot be awarded to the respondent for the manner of the dismissal, for his injured feelings, or for the loss he may sustain from the fact that the dismissal of itself makes it more difficult for him to obtain fresh employment. This being the case, it is difficult to understand the basis upon which the Deputy Registrar thought it fit to award a huge round sum of RM2 million under this head.

[5] Damages are not awarded simply because the plaintiff has thrown them at the head of the Court. The loss must be shown to have actually occurred and also be recoverable in law before an award can be made. In the absence of these materials the trial Judge must have erred in law in refusing the appellant's application for a stay of execution.

[6] To prevent prejudice to the appellant pending the hearing of the appeal against the Deputy Registrar's award it was imperative that the respondent be compelled to disgorge, if not the moneys then at least the Fixed Deposit Receipt, so that the subject matter could be preserved until the final disposal of the appellant's appeal.

[7] The appellant had a very powerful appeal to argue on the measure of damages the respondent was entitled to recover. Also, in all the circumstances, it was clear that there was a very real risk that the appeal would be rendered wholly nugatory if this Court does not intercede.

[Order in terms of the appellant's application. Respondent's application dismissed]

*[**Bahasa Malaysia** Translation of Headnotes]*

PROSEDUR SIVIL: *Bidangkuasa - Mahkamah Rayuan - Samada mempunyai bidangkuasa untuk membuat perintah interim bagi mengekalkan wang sementara menanti penyelesaian rayuan - Samada diberi kuasa untuk membuat perintah bagi menghalang ketidak-adilan atau kemudaratan tuntutan - Seksyen-seksyen 44(1) & 44(3) Akta Mahkamah-Mahkamah Kehakiman 1964 - Bidang operasi.*

PROSEDUR SIVIL: *Remedi - Responden terkilan oleh perintah Mahkamah Rayuan - Bentuk tindakan yang wajar - Samada harus merayu - Samada wajar untuk memohon-balas bagi mengenepikan perintah.*

GANTIRUGI: *Pemecatan - Gantirugi bagi kecederaan perasaan - Samada boleh diawardkan secara simpliciter - Kerugian - Samada kerugian mesti dibuktikan telah berlaku dan boleh dituntut menurut undang-undang - Pendaftar membuat award sebanyak RM2 juta bagi distress, kesakitan, kebimbangan, kesukaran, malu dan keaiban - Samada boleh dipertahankan - Samada tanpa dasar undang-undang.*

Ini merupakan satu permohonan interim oleh perayu untuk mendapatkan perintah bahawa responden menyerahkan kepada Penolong Pendaftar Mahkamah Rayuan, sijil Akaun Simpanan Tetap ke dalam mana responden telah mendepositkan wang sebanyak RM2,351,725.80 yang telah dibayar kepada beliau oleh jurubank perayu.

Responden adalah seorang peguambela dan peguamcara tetapi sebaliknya adalah juga merupakan bekas kakitangan perayu. Dalam tahun 1987 responden telah memulakan tindakan terhadap perayu kerana pemecatan secara salah, bagi yang mana penghakiman terus telah diberikan oleh Hakim. Berikutan dengan penghakiman itu, pada 24 Oktober 1994, Penolong Pendaftar (pendaftar) telah mengawardkan kepada responden gantirugi sebanyak RM2,274,151.42 (perintah taksiran), yang mana RM2 juta adalah bagi distres, kesakitan, kesukaran, malu dan keaiban.

Perayu telah memohon untuk mendapatkan suatu penggantungan bagi perintah taksiran, tetapi permohonan itu telah ditolak oleh Pendaftar atas alasan bahawa

beliau adalah ketika itu *functus officio*. Perayu telah juga merayu kepada Hakim dalam kamar terhadap perintah itu tetapi rayuan itu tidak dapat diteruskan kerana nota-nota keterangan Pendaftar tidak diberikan.

Responden, sementara itu, mengambil langkah-langkah untuk menguatkuasakan perintah taksiran dan, setelah mendapatkan perintah garnisan, responden telah menyampaikan notis ke atas jurubank perayu untuk menunjukkan sebab mengapakah perintah itu tidak seharusnya dijadikan mutlak. Perayu telah memohon untuk membatalkan perintah itu, menyebut s. 39 Akta Suruhanjaya Pelabuhan Pulau Pinang 1955 sebagai alasan-alasannya, namun begitu, perintah itu telah dijadikan mutlak oleh Pendaftar pada 7 Disember 1994 (perintah garnisan).

Perayu telah merayu kepada Hakim terhadap perintah garnisan, dan terhadap keengganan Pendaftar memberikan perintah penggantungan pelaksanaan, tetapi rayuan-rayuan itu, bersama-sama dengan satu permohonan berasingan untuk penggantungan, telah ditolak oleh Hakim yang bijaksana. Rayuan terhadap perintah taksiran, walau bagaimanapun, telah ditangguhkan oleh Hakim, lalu perayu telah memohon kepada Mahkamah Rayuan untuk mendapatkan penggantungan bagi keuda-dua perintah taksiran dan perintah garnisan.

Pada 20 Disember 1994, selaras dengan permohonan perayu, Presiden Mahkamah Rayuan yang bijaksana telah membuat satu perintah interim yang memerintahkan penggantungan perintah taksiran dan perintah garnisan sehingga perbicaraan permohonan *inter partes* pada 3 Januari 1995. Walau bagaiamanapun, sewaktu perintah *ex parte* ini, jurubank perayu (BBMB) telah pun membayar responden gantirugi yang ditaksirkan.

Di perbicaraan 3 Januari 1995, responden telah memaklumkan Mahkamah bahawa beliau telah meletakkan wang yang dipersoalkan itu ke dalam satu Akaun Simpanan Tetap. Responden, namun begitu, gagal untuk memberikan Mahkamah, atau perayu, butir-butir akaun tersebut. Dalam keadaan yang sedemikian, satu perintah telah dibuat oleh Mahkamah (perintah 3 Januari) menghalang responden daripada membazirkan wang itu sementara menantikan permohonan perayu untuk satu injunksi yang sempurna bagi mengekalkan wang tersebut, dan berikutan itu, perayu telah membuat permohonan semasa ini memohon untuk mendapatkan perintah interim supaya responden menyerahkan Sijil Akaun Simpanan Tetap tersebut kepada Pendaftar.

Responden telah, melalui permohonan-balas, memohon untuk mengenepikan perintah bertarikh 3 Januari atas alasan (i) bahawa Mahkamah Rayuan tidak mempunyai bidangkuasa untuk membuat perintah yang sedemikian kerana perintah yang sedemikian membawa kepada satu injunksi Mareva (ii) bahawa perintah itu yang merupakan perintah interlokutori tidak boleh dirayu (iii)

bahawa hanya Mahkamah Tinggi boleh membuat perintah yang sedemikian, dan akhirnya (iv) bahawa s. 44 Akta Mahkamah Kehakiman 1964 tidak terpakai. Di hadapan Hakim rayuan yang bijaksana, isu-isu utama yang berbangkit adalah:

(i) samada terdapatnya asas bagi award yang telah dibuat oleh Pendaftar.

(ii) samada Hakim perbicaraan telah tersalah pertimbangan di sisi undang-undang dalam menolak permohonan perayu untuk mendapatkan penggantungan pelaksanaan.

(iv) samada setelah terkilan oleh perintah 3 Januari tersebut, ianya adalah wajar bagi responden berusaha untuk mendapatkan remedi melalui permohonan-balas.

Diputuskan:

Oleh Mahadev Shankar HMR (menyampaikan penghakiman Mahkamah):

[1] Jika responden terkilan oleh perintah Mahkamah ini pada 3 Januari 1995 satu-satunya remedi baginya adalah untuk merayu. Ini telah gagal dilakukan.

[2] Tidak terdapat merit dalam penegasan bahawa Mahkamah Rayuan tidak mempunyai bidangkuasa untuk membuat perintah 3 Januari 1995. Melalui s. 44(1) Akta Mahkamah Kehakiman 1964, Mahkamah ini diberi kuasa untuk membuat satu perintah interim untuk menghalang kemudaratan kepada tuntutan-tuntutan pihak-pihak di hadapannya. Seksyen 44(3) Akta tersebut, tambahan pula, telah memberikan kepada Mahkamah penuh bidangkuasa persamaan yang meliputi bidangkuasa untuk mengubah perintah Hakim perseorangan itu.

[3] Keseluruhan kes ini berkisar atas usaha-usaha perayu untuk mengekalkan hal-perkara tindakan ini sehingga penyelesaian muktamad rayuan ini. Memikirkan hal ini, keengganan responden untuk mengemukakan butir-butir yang sepenuhnya mengenai apa yang telah dilakukan olehnya dan penegasannya bahawa Mahkamah tidak seharusnya campur-tangan dalam haknya kepada hasil litigasinya telah dengan wajarnya mempertingkatkan tanggapan perayu bahawa terdapat risiko yang sebenar bahawa rayuan yang berjaya akan menjadi nugatori.

[4] Menurut common law, gantirugi tidak boleh diawardkan kepada responden kerana cara pemecatan, kerana perasaannya yang tercedera, atau kerana kerugian yang mungkin dialaminya oleh kerana pemecatan itu sendiri akan menjadikan lebih sukar baginya untuk mendapat pekerjaan baru. Oleh kerana keadaan ini, ianya sukar untuk memahami dasar di atas nama

Penolong Pendaftar berfikir ianya sesuai untuk mengawardkan satu jumlah wang yang amat besar sebanyak RM2 juta di bawah tajuk ini.

[5] Gantirugi tidak diawardkan semata-mata kerana plaintif telah mengutarakannya kepada Mahkamah. Kerugian mestilah ditunjukkan sebagai telah benar-benar berlaku dan juga boleh dituntut menurut undang-undang sebelum sesuatu award boleh dibuat. Dalam ketiadaan perkara-perkara ini Hakim perbicaraan tentunya telah tersalah pertimbangan di sisi undang-undang dalam menolak permohonan perayu bagi mendapatkan penggantungan pelaksanaan.

[6] Bagi menghalang kemudaratan kepada perayu sementara menantikan perbicaraan rayuan terhadap award Penolong Pendaftar, ianya adalah sangat mustahak bahawa responden dipaksa menyerahkan, jika tidak wang tersebut maka sekurang-kurangnya Resit Simpanan Tetap tersebut, supaya hal-perkara ini boleh dikekalkan sehingga penyelesaian muktamad rayuan perayu.

[7] Perayu mempunyai rayuan yang sangat kukuh untuk berhujah berhubung jumlah gantirugi yang responden berhak untuk mendapatkan semula. Juga, dalam keseluruhan keadaan kes, ianya jelas bahawa terdapat risiko yang sebenarnya bahawa rayuan tersebut boleh menjadi nugatori jika Mahkamah ini tidak mencelah.

[Perintah seperti yang dipohon perayu. Permohonan responden ditolak.]

Case referred to:
Addis v. Gramophone Company Ltd. [1909] AC 488 ***(foll)***

Legislation referred to:
Courts of Judicature Act 1964, s. 44, (1), (3)
Penang Port Commission Act 1955, s. 39

For the appellant - Raja Aziz Addruse (Ramsun C.H. Ho & Sharifah Intan Aidid with him); M/s. Lim Huck Aik & Co.
For the respondent - R R Sethu (K. Balaguru with him); M/s. Khana & Co.

JUDGMENT

Mahadev Shankar JCA:

This is an interim application by the appellant (Encl. 20a) for an order that the respondent do hand over to the Deputy Registrar of this Court pending the final disposal of this appeal the certificate of the Fixed Deposit Account into which the respondent placed the sum of RM2,351,725.80 which was paid by the appellant's bankers to the respondent and for consequential directions regarding the disposal of the said moneys.

We also had to deal with an application by the respondent (Encl. 23a). These applications were listed as Items 4A and 4B, and we heard them together.

In 1987 the respondent filed an action in the High Court claiming that the termination of his service was *ultra vires* the Penang Port Commission Act, that he was therefore entitled to all arrears of emoluments, that he was entitled to be confirmed as a traffic supervisor, damages and others.

In February 1994 the respondent applied for summary judgment. The Judge granted an order in terms on 20 October 1994. The appellant appealed to this Court. Whilst this appeal was pending the respondent proceeded before the Deputy Registrar to assess the damages. On 24 October 1994 the Deputy Register made an order awarding the respondent RM2,274,151.42 of which RM2 million was for distress, anguish, anxiety, inconvenience embarrassment and humiliation. The appellant appealed to the Judge in chambers' against this assessment. There appears to have been some difficulty in obtaining the Deputy Registrar's notes of evidence of the hearing pertaining to the assessment or his grounds of judgment as to how he felt entitled to award this global sum. In the absence of this material the appellant was not able to proceed with its appeal against this assessment on the dates fixed and the hearing was adjourned.

Immediately after the Deputy Registrar made his order on 24 October 1994 the appellant's solicitors applied for a stay of execution. They were advised by the Deputy Registrar to file a written application. This they did on 3 November 1994. But when this matter came up for hearing on 18 November 1994 the Deputy Registrar informed the appellant's solicitors that he had dismissed their oral application on 26 October 1994. He then proceeded to dismiss the written application he had directed the appellant to file on the ground that he was *functus officio*.

The respondent in the meantime took steps to enforce the Deputy Registrar's order. He applied for a Garnishment Order on 11 November 1994, and served a Notice to the appellant's bankers (Bank Bumiputera Malaysia Bhd. (BBMB)) to show cause why the Garnishment Order should not be made absolute.

The appellant filed an application on 6 December 1994 to strike out the Garnishee Order on the ground that s. 39 of the Penang Port Commission Act 1955 imposed statutory trusts on the general account of the appellant and it could not therefore be garnished.

Without first determining the validity of this application the Deputy Registrar made the Garnishee Order absolute on 7 December 1994. On 8 December 1994 the appellant appealed to the Judge against this order and against the Deputy Registrar's refusal to grant a stay of execution.

On 12 December 1994 the respondent's solicitors demanded that BBMB pay the full sum by noon on 13 December 1994 or face an application for contempt. At this point we should mention that the respondent's solicitors Khana and Company is a sole proprietorship and the respondent is that sole proprietor.

By 19 December 1994 the notes of evidence and grounds of judgment of the Deputy Registrar for his assessment of damages were still not available. The learned Judge dismissed the appellant's appeals against the making absolute of the Garnishment Order, against the refusal of granting a stay of execution and also dismissed a separate application for stay. The appeal against the assessment of damages was adjourned once again.

The appellant then filed on the same day an application to this Court for a stay of execution of the Deputy Registrar's assessment and the Garnishee Order. Counsel for the appellant tried to see the learned President of this Court the same day but was unable to do so as the learned President was not available. He managed to see the learned President on 20 December to make an *ex parte* application but by then the respondent had already forced BBMB to give him a draft for the said moneys. The learned President nevertheless made an interim order *ex parte* that there be a stay of the Registrar's order and the Garnishment Order until the hearing of the application *inter partes* on 3 January 1995. This order was served on the respondent on 20 December 1994.

When the matter came for hearing before the full Court on 3 January 1995 the respondent in answer to the Court revealed that as soon as he got the draft from BBMB he placed the money in a fixed deposit account with Bank Pertanian Malaysia in the names of members of his family whom he did not identify. The Court then made an order restraining the respondent from dissipating the moneys pending the disposal of a formal application by the appellant for an appropriate injunction for the preservation of these moneys. The appellant's solicitors were left to obtain particulars of the Fixed Deposit Account from the respondent's solicitors. However when the appellant's solicitors wrote for this information the respondent declined to give any reply.

The appellant's solicitors thus filed this application without being able to give precise details as to what the respondent did with the money which is the subject matter of this appeal.

As we indicated earlier the respondent filed a cross-application (4B). In it the respondent prayed that the order made by this Court on 3 January 1995 be set aside and that damages sustained by the respondent as a consequence of this order be assessed by the Deputy Registrar of this Court and paid by the appellant. If the respondent was aggrieved by the order of this Court on 3 January 1995 his only remedy was to appeal. This he failed to do.

As against the appellant's application Counsel for the respondent submitted that this Court had no jurisdiction to make such an order because such an order amounted to a Mareva injunction, that being an interlocutory order it is not appealable, that only the High Court could make such an order and finally that s. 44 of the Courts of Judicature Act 1964 had no application.

With respect we were unable to make any sense of this submission. This entire exercise had its genesis in the appellant's efforts to preserve the subject matter of this action until the final disposal of this appeal. The respondent's reluctance to come out with full particulars as to what he had done with it and his contention that the Court should not interfere with his right to the fruits of his litigation has justifiably increased the apprehensions of the appellant that there is a very real risk that a successful appeal could be rendered nugatory.

There are other very disturbing features about this litigation. *Addis v. Gramophone Company Ltd*. [1909] AC 488 is well-entrenched in the common law and damages cannot be awarded for the manner of the dismissal of his injured feelings or for the loss he may sustain from the fact that the dismissal of itself makes it more difficult for him to obtain fresh employment. We are at a total loss to understand on what basis the Deputy Registrar thought fit to award a huge round sum of RM2 million under this head. The respondent refused to turn up for work on 1 March 1985 claiming that he had been constructively dismissed. It is far from clear whether the Deputy Registrar considered the respondent's duty to mitigate his damage. Furthermore the respondent claimed that he was entitled to be confirmed as traffic supervisor because he thought he was qualified for the post. The undeniable fact is that he was never appointed to that post by the appointing authority. The basis on which the Deputy Registrar proceeded to calculate the alleged "arrears" of emoluments due to the respondent from l March 1985 (as also the award of RM2 million) would have been an unsolved mystery at least until the Deputy Registrar's notes of evidence and grounds of judgment became available. Damages are not awarded simply because the plaintiff has thrown them at the head of the Court. The loss must be shown to have actually occurred and also be recoverable in law before the award can be made.

In the absence of these materials we are of the opinion that the trial Judge erred in law in refusing the appellant's application for a stay of execution.

The conduct of the respondent calls for comment. He was acting as solicitor in a matter in which he was personally involved. He was aware when he sought to enforce the order in his favour that an appeal was pending and that an application for stay was also pending. His stand before us was nothing short of a *fait accompli* – since he had already got the bank draft by 20 December 1994 his claim is that there is no execution left to be stayed

and the Court is therefore powerless to interfere. Perhaps this is why, when invited to do so, he declined to make full disclosure as to what he did with the money he so precipitately obtained.

The material words in s. 44(1) of the Courts of Judicature Act 1964 are as follows:

> In any proceeding pending before the Court of Appeal ... any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding ... may at time be made by a Judge of the Court of appeal.

Section 44(3) clearly vests the full Court with parallel jurisdiction which extended to varying the order of the single Judge.

To prevent prejudice to the appellant pending the hearing of the appeal against the Deputy Registrar's award it was imperative that the respondent be compelled to disgorge if not the moneys then at least the Fixed Deposit Receipt so that the subject could be preserved until the final disposal of the appellant's appeals.

The appellant in our view had a very powerful appeal to argue on the measure of damages the respondent was entitled to recover. The question as to whether the High Court could appoint him to the post he claimed to be qualified for was another issue. In all the circumstances it was clear to us that there was a very real risk that the appeal would be wholly nugatory if we did not intercede. We therefore dismissed the respondent's application and made an order in terms of the appellant's application.

After we did so Mr. Balaguru of Counsel for the respondent undertook to produce the Fixed Deposit Receipt the next day but claimed that the respondent had aggregated other moneys of his own into the fixed deposit he created. We therefore gave the respondent liberty to apply for a further order with the concurrence of the appellant's solicitors for the necessary arrangements required to get the respondent's other moneys in excess of RM2,351,725.80 released to him subject to any other orders required as to the proper disposal of the interest earned.

Reported by W.A. Sharif